In the Supreme Court of the United States

October Term, 1979

Supreme Court, U. S.
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No. 79-1241

ASHLAND OIL, INC.,
Petitioner,

vs.

PHILLIPS PETROLEUM COMPANY, and
UNITED STATES OF AMERICA,
Respondents.

REPLY BRIEF OF PETITIONER

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Respondents seek to blur the clearly defined, recurring federal issues presented, by submitting a plainly erroneous analysis of the valuation decisions below. The fundamental and recurring conflict concerning the time when judgment interest should commence under 28 U.S.C. §1961 is ignored, and treated as a matter of individualized case by case discretion, which would delete from the statute its mandatory direction.

The Conflict of Decisions Under 28 U.S.C. §1961

In *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 307 (1948), certiorari had been granted to resolve a conflict between the Second Circuit case being reviewed (164 F.2d 21), and *Louisiana & A.R.Co. v. Pratt*, 142 F.2d 847 (5th Cir.). In *Pratt*, contrary to *Briggs*, judgment interest from the time of the first judgment was awarded because that was the date the correct "judgment should have been entered. . . ." This rationale was later approved by the Ninth Circuit in *Perkins v. Standard Oil Company of California*, 487 F.2d 672, in holding "that interest should run from the date of entry of the original judgment be-

cause that is the date on which the correct judgment should have been entered."

As a solution to the conflict, and to the confusion which respondents' analysis invites, the rule is "eminently sound". "Interest on Judgments in Federal Courts", 64 Yale L. J. 1019, 1040-1047. Before *Perkins* fully adopted this rule, the Ninth Circuit had skirted its edges, but had rejected its full solution, in *United States v. Hougham*, 301 F.2d 133 (9th Cir.). There, the United States had urged the same *Pratt* "equity of the statute" rule when its original judgment had been increased as a result of a later appeal. But the Court did not apply it, recognizing the "conflict between the circuits on this question."

The conflict was recognized and emphasized by Judge Jerome N. Frank, dissenting, in *Chemical Bank & Trust Co. v. Prudence-Bonds Corp.*, 213 F.2d 443, 446 (2nd Cir.), one of several pertinent cases not discussed by respondents. Judge Frank would have awarded judgment interest under the above rule, though the original judgment was revised by an increase as the result of an appeal.

However tediously respondents may seek to find small factual distinctions in the conflicting cases, it is obvious that the foregoing rule is in direct conflict with the rule applied by the Tenth Circuit below, in citing and following the rationale of *Hysell v. Iowa Public Service Co.*, 559 F.2d 468 (8th Cir.), and its kindred cases from the Second and Seventh Circuits. Each rule would require a different result if applied in this case.

Respondents' approach is merely an invitation to the continued confusion and conflict. It fails to suggest any coherent solution to the conflict; nor does it even attempt to rebut the serious inequity of the rule applied below. Respondents would have the so-called "unliquidated" nature of the amount owed as precluding judg-

ment interest from the time of the first judgment—a factor apparently adopted by the *Hysell* line of cases. Thus, any appeal from any judgment would raise "uncertainty" over the amount owing, and any appeal would, under that rationale, defer the accrual of judgment interest, and enable a defendant to profit from the use of plaintiff's money, pending disposition of one or more appeals, unless the amount was totally affirmed.

This "unliquidated amount" approach is an example of muddied thinking, a carry-over of early approaches to prejudgment interest by courts seeking escape from the early common law rejection of interest as "usury." The current diminishing effect of that archaic theory as to prejudgment interest simply emphasizes the truth that it cannot rationally be applied in the area of statutory judgment interest. If one man has the use of another's money from the time of a judgment of liability against him, why should he profit from using another's money during appeals which may require some changes in the amount? Certainly 28 U.S.C. §1961 does not require that result.[1]

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1. High interest rates and high inflation are resulting in widespread legal efforts to adapt our laws to meet obvious needs in regard to judgment interest and related factors. "Inflation Puts the Bite on the Law," National Law Journal, Vol. 2, No. 29, March 31, 1980.

The Federal Court Improvement Act of 1979, passed by the U.S. Senate in October, 1979 (S. 1477), now pending in the House, would amend 28 U.S.C. §1961 to provide a uniform, current rate of interest on all federal judgments (Title I, Part B, Sec. 211 of S. 1477), rather than applying nonuniform state rates. However, the Senate Bill would not, if enacted as law, affect the present language of 28 U.S.C. §1961 over which the existing conflict of decision has developed.

Most courts have also modified their "unliquidated" amount rule as to prejudgment interest, to allow it when the amount was ascertainable from existing data and subject to computation. Even if the "unliquidated" amount concept were to be applied in this case, it would meet that test because the price and cost calculations under the workback method were based on recorded, documented prices and costs.

One thing is beyond reasonable dispute. The time is ripe to resolve the conflict among the circuits. We suggest this case is an ideal vehicle to resolve the dispute because it does involve a modification of the amount owing as fixed by the original judgment, as a result of the later appeal. It is thus open to this Court to affirm the judgment below by adopting the *Hysell* rationale that any earlier judgment vacated on appeal must be disregarded, in determining judgment interest; or to reverse the judgment below by applying the *Perkins* rationale, that the original judgment is the time from which judgment interest should run, because that is when the correct judgment should have been entered. Or if, as respondents would have it, every case should be discretionary depending on the "extent of reversal," by ignoring the mandatory nature of Section 1961, this Court, at least, can so state, and put an end to uncertainty.

In short, the factual and legal setting of this case presents a unique opportunity to decide the existing conflict, and to set forth all needed uniform guidelines for judgment interest awards under Section 1961.[2]

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2. The opportunity is also available, if desired, to reexamine the 5-4 holding in *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304 (1948), that failure of an appellate mandate to mention judgment interest deprives a district court of power to award such interest prior to the second judgment.

The 1977 *en banc* decision below did not mention judgment interest. Neither Phillips nor the United States thought to raise that objection in the last appeal; nor did it occur to the court of appeals which rejected the interest claim on the merits.

Judge Frank, in struggling with the *Briggs* problem in his dissent in *Chemical Bank & Trust Co. v. Prudence-Bonds Corp.*, 213 F.2d 443, 445, observed that the earlier appellate mandate had not mentioned judgment interest "for the very simple reason that we did not think about it."

This silence is typical of most appeals, because the first appeal involves the merits. The statute, Section 1961, provides

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Ashland's Reliance on the Law of the Case

Respondents make a strained effort to explain away the plain holding in the 1977 *en banc* decision rejecting their contention that the base contract price should be available for use in the helium valuation method, an "explanation" which the court of appeals in 1979, of course, did not purport to make because it is marked by sophistry and evasion, and is not true. Phillips combines that approach with an erroneous view of Ashland's right to rely upon the 1977 decision in presenting its case on the limited issues remanded.

Respondents cannot so easily confuse the important and recurring federal judicial question presented, a question so direct and succinct, and so at odds with the result reached by the district court, that the court of appeals itself refused to treat it in the 1979 per curiam decision affirming the district court. The court of appeals' silence in declining to apply the law of the case, combined with its silence concerning Ashland's reliance on the 1977 holding, is mute testimony to the governing significance of this important principle of federal jurisprudence, which could

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Footnote continued—

for judgment interest, and is self-executing. There is no necessity for a money judgment to separately provide for judgment interest thereafter, and it is not any matter of concern at that point. These factors emphasize the necessity of recognizing the mandatory, self-executing, nature of 28 U.S.C. §1961, and the desirability of overruling *Briggs*, which failed to consider this critical aspect, as noted in the dissent.

The majority decision in *Briggs* has also led to error in other areas involving mandatory statutory relief, where an appellate mandate has not mentioned such relief in a remand. In *Perkins v. Standard Oil Co. of California*, 399 U.S. 222 (1970), the court of appeals had felt obliged to deny statutory attorneys' fees after a remand by this Court was silent on the right to attorneys' fees. This Court corrected the error by holding that its failure to mention the right to fees did not preclude their subsequent award, provided for by 15 U.S.C. §15.

more easily be ignored than stated, in order to arrive at a result inconsistent with it.

Phillips makes the irrelevant argument that Ashland had no right to rely on the 1977 *en banc* decision, because Ashland knew that Phillips and the United States were seeking to relitigate the prior denial of its contention that the base contract price should be used in the valuation method, and thus was not surprised, and could have chosen to relitigate the issue. This argument completely avoids the real question. The question is, did Ashland have a right to rely on the 1977 holding in its favor, despite respondents' efforts to relitigate it? If Ashland did not have that right, it means that the law of the case doctrine is meaningless because any losing party could choose to relitigate a question and force the other party to do likewise. Finality and judicial economy must then vanish into thin air, permitting a continued, time-consuming, economically devastating war of attrition, in which, as in this case, nominal winners become losers and the losers are the winners.

The same situation existed in the lower courts in *Richles v. Margolies*, 279 U.S. 218 (1929), discussed in our petition, pp. 14-15. After the first appeal, the receiver was well aware that the claimant was proceeding to obtain a state court judgment with a view to establish it as binding in the federal action, despite the appellate ruling that it would not be binding. He did not oppose the judgment because it was not, according to the appellate court, to be binding on him in federal court. Yet, if there is indeed a viable law of the case doctrine, he had a right to so rely. A party declining to relitigate what the other seeks to reopen is not merely a "deliberate trial tactic" (Phillips' Brief, p. 11), but it is a trial tactic rooted in an ap-

pellate decision which was supposed to lend finality to the issue decided.

Ashland's reliance was repeatedly stated to the district court at the pretrial conferences, and at every stage thereafter. The pretrial order required the trial to proceed under the 1977 appellate mandate. (A. 122a). Neither prior to, nor during trial, did the district court ever rule that the mandate did, or did not, decide the base contract price question adversely to respondents.

But the single dissent from the *en banc* decision had no difficulty in construing the precise holding of the court of appeals, that the valuation method was to start with the selling price of pure, commercially marketable helium, and that the base contract price had been rejected. (A. 35a-36a). This was also clear to the United States and to Phillips when they filed petitions in this Court to review the decision. The 1977 decision "affirmed the district court's approach . . . whereby the court started with a supposed market value for pure helium and deducted the costs. . . ." (U.S. Petition, No. 77-530, p. 12).

The key to the district court's ultimate finding that its 1973 decision was "erroneous" is revealed in a disturbing interchange during final arguments on November 9, 1978. After having failed to decide the impact of the appellate mandate before or during the trial, the court erroneously assumed that the 1973 documented record was not before him,[3] and forcefully indicated he preferred

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3. "Mr. Sawatzky: . . . this has been presented to the Court of Appeals before, and these documented facts, they stand out so clearly, and we didn't go into them really at the [1978] trial because they were already a matter of record, and they were the basis for the Court's decision at that time, and these were briefed very extensively in the Court of Appeals two times by all the parties.

"The Court: It's not a part of the record here, there is no evidence on it. . . ." (Tr. pp. 52-53).

to decide what ought to be done without following the dictates of an appellate court.[4]

This non-judicial stance culminated in the district court's verbatim adoption of most of respondents' requested findings on the questions they relitigated. The value of $3.00 per m.c.f., however, was lower than the lowest amount (over $4.00) conceded by Phillips under its version of the valuation method; and the court denied prejudgment interest which respondents had also conceded.

The *en banc* court, and the parties, were perfectly aware in 1977 why the court had remanded for further evidence on the "selling price" of helium, to be used as the starting value. The base contract price had been rejected as an element of the method, but respondents loudly argued there was "not an iota of evidence in the record showing any sale at $20.00 per Mcf." for pure, marketable helium. (U.S. Brief, rehearing *en banc*, p. 35; Phillips' Brief, rehearing *en banc*, p. 37). Respondents conveniently failed to tell the court they could present no contrary evidence on this point. But the *en banc* opinion permitted them this opportunity on remand[5]

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4. "The Court [addressing Ashland counsel]: . . . You made a strong argument before in '73 to me, and you sold me on it, and the evidence supported what you said. The evidence supported what I did.

"But I have my doubts as to what the evidence supports now, and how much my hands are tied by the mandate of the Circuit to me to try this case again. I am in doubt. I don't know whether I should be an independent Judge to do what I think ought to be done or try to find out what they tell me to do and do what they tell me to do. I have never been used to doing that way. I like to do what I think ought to be done in the field of law and in the field of evidence and the field of justice." (Tr. p. 45).

5. This is also demonstrated by comparing the 1975 panel decision, and the 1977 *en banc* decision on this point:

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Instead, by 1978 respondents began claiming that limited remand as their authority to reopen the entire starting value question, attempting to read out of the decision the rejection of their prior contention that the base contract price should be utilized.

The complete irony of the court of appeals' 1979 refusal to consider Ashland's "dry" argument that the law of the case was viable, and had been relied upon,[6] seems to have been lost in the passage of time since 1973. For at that time, respondent's primary evidence on value consisted of isolated, noncomparable transactions purportedly supporting a $2.00 value. Respondents gave only secondary, alternative support to use of the contract base price in the workback valuation method, because the base itself was constructed without reference to true market value and included as an element the alleged $2.00 value based on the noncomparable transactions. It was, therefore, even weaker than its primary theory.

Footnote continued—

1975: "The trial court used a figure of $20.00 per Mcf for the selling price of helium, and this was the 'value' element of the value less expense method. This figure was testified to by the witness for the plaintiffs, and the amount is well within the Bureau of Mines Yearbook figures for the several years in issue. The evidence supports this figure also, and this price issue was not directly met by defendant by way of proof." (A. 51a).

1977: "The trial court used a figure of $20.00 per Mcf for the selling price of helium, and this was the starting figure or element of the value less expense method. This figure was testified to by the witness for the plaintiff; this price issue was not met by defendant by way of proof. On remand the validity of this figure must be examined by the trial court, and a determination made again as to the proper starting value." (A. 21a).

6. The issue of reliance was basic and implicit in its entire presentation of the case in the district court and on appeal. Reliance was apparent from its appellate brief, which also specifically stressed that factor, pp. 30, 46, 48. This was reiterated in its oral argument, and in its petition for rehearing.

Because Ashland in 1978 insisted on confining the issues to those remanded, and refused to reopen and relitigate what it had won; and because the district court considered the 1973 trial record as not before it, and that its affirmed rulings were subject to reexamination, respondents ultimately prevailed on the weaker of the two valuation arguments they had made in 1973.

If these events had been merely a game of judicial chess in which rules can change in midstream, the foregoing result would only be comical. But in our real world where judgments are meant to be binding, and litigation deeply affects people's lives, what has occurred constitutes a grave injustice and exemplifies an attitude encouraging litigants to appeal, to relitigate, and to appeal again.

It is this ingrown attitude in our system which has turned the idealistic search for justice into a quagmire of nonfinality, increased litigation, heavy costs and interminable delay, in which justice is equally denied to all.

But, in final analysis, the key error in the district court decision, as well as in the per curiam affirmance, was the continued failure to recognize the effect of Ashland's justified reliance on the 1977 *en banc* decision in presenting its evidence.

This issue of reliance as it pertains to the law of the case doctrine is of crucial importance in federal jurisprudence. Surely Ashland had the right to rely on the 1977 decision despite respondents' attempt to relitigate. But if, indeed, Phillips is correct in stating that reliance is unjustified whenever a losing party chooses to relitigate, it is time for this Court to say so, in order to prevent unfair trials resulting when prevailing parties decline to relitigate

what they have won, and when district courts delay ruling on the scope of a mandate until the trial is ended.

Respectfully submitted,

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